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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

IMRAN ALRAI

\* \* \* \* \*

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\* 18-cr-192-01-JL

\* November 15, 2019

\* 11:12 a.m.

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TRANSCRIPT OF CHAMBERS CONFERENCE  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government:

John S. Davis, AUSA  
Matthew Hunter, AUSA  
Cam T. Le, AUSA  
U.S. Attorney's Office

For the Defendant:

Timothy M. Harrington, Esq.  
Shaheen & Gordon, PA

Court Reporter:

Susan M. Bateman, RPR, CRR  
Official Court Reporter  
United States District Court  
55 Pleasant Street  
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1 P R O C E E D I N G S

2 THE COURT: This is United States versus Imran  
3 Alrai, 18-cr-192-01-JL. This is the final pretrial  
4 conference.

5 Matthew Hunter, Cam Le, and John Davis here for the  
6 prosecution.

7 Tim Harrington here for the defense.

8 We're in chambers and we're on the record.

9 Okay. So this is a bench trial?

10 MR. HARRINGTON: It is, Judge.

11 THE COURT: You know, so I guess I'm going to have  
12 to do some kind of colloquy where your client waives the right  
13 to a jury trial.

14 MR. HARRINGTON: Yeah, there was a document filed  
15 by Peter Anderson because he had initially gone through it  
16 with the client, but there's nothing -- there's no colloquy.  
17 There's nothing else.

18 THE COURT: I think we should do that.

19 MR. HARRINGTON: No question. Absolutely.

20 THE COURT: Well, how do you feel about that, by  
21 the way?

22 MR. HARRINGTON: I'm mixed, Judge, and I told my  
23 client so.

24 The issue that you're going to be presented with  
25 from the defense perspective is going to be a somewhat narrow

1 one, and I think it will be mixed factum law so --

2 THE COURT: The issue being whether the actual  
3 services rendered somehow undermine any culpable mental state  
4 or any other element to the offense, right?

5 MR. HARRINGTON: Correct, Judge.

6 THE COURT: Yeah.

7 MR. HARRINGTON: And so that combined with -- he  
8 had concerns with the potential makeup of a jury panel. You  
9 know, New Hampshire is a pretty white state. Imran Alrai is  
10 from Pakistan. Funds are being wired over to Lahore. He was  
11 concerned that there might be some negative inferences that  
12 would really go unnoticed in a jury panel. So those two  
13 things kind of formed his decision to kind of go jury-waived.

14 We talked about, you know, the aspects of it,  
15 unanimity, things of that nature, and I answered all the  
16 questions I could for him. And ultimately, you know, it's his  
17 right to waive, and he decided he would like to go with a  
18 bench trial.

19 THE COURT: All right. We'll do a colloquy then  
20 the first day of the trial. We'll do it just before we get  
21 started I guess.

22 We've told the jury to be here at 9:00, right,  
23 Charli?

24 THE CLERK: It's not a jury trial, Judge.

25 THE COURT: That's right. It's so funny. It's

1 just so automatic to always thinking that.

2 I was going to say come in early to do it, but  
3 there's no reason to come in early because we're not wasting a  
4 jury's time. I'll just do it on the record at the beginning.

5 MR. HARRINGTON: What do you think our days are  
6 going to be like, Judge, from like when to when, because I  
7 know you might have other stuff. I don't know if you're going  
8 to have to interrupt proceedings. When are you going to  
9 start? When are you going to end?

10 THE COURT: When I have other stuff to do, I always  
11 schedule it over the lunch hour or during breaks. I try to go  
12 till 5:00. If you want to do something different, though,  
13 both sides --

14 MR. HARRINGTON: No, I would like to get -- from my  
15 perspective, I would like to get in as much -- so if you're  
16 talking 9:00 to 5:00, I would like to get in as much testimony  
17 as we can because there's a lot of witnesses.

18 THE COURT: Okay.

19 Is that okay with everybody here?

20 MR. DAVIS: Yes.

21 MR. HUNTER: Yes.

22 THE COURT: All right. 9:00 to 5:00. That's one  
23 of the things I was going to ask you about. Okay. So we're  
24 starting at -- and we'll have a waiver of the right to a jury  
25 trial on the record at the beginning of trial.

1           Where are we now that you've really got your heads  
2 into it, or getting closer, in terms of length of trial? Any  
3 changes to that?

4           MR. DAVIS: I think two weeks is about right,  
5 Judge. Right now we have --

6           THE COURT: About ten trial days?

7           MR. DAVIS: We have 40 witnesses we will likely  
8 call. There's probably some of them who could be trimmed,  
9 we're still talking stipulations, but --

10          THE COURT: I wouldn't be surprised if once you got  
11 rolling that you would even be able to stipulate to some  
12 evidence almost on a daily basis, like figure it out the night  
13 before. I'm not asking you to do that. I'm just saying that  
14 it wouldn't surprise me that you would want to do because  
15 there's going to be certain things given the defense you're  
16 presenting that make certain case-in-chief evidence less  
17 than -- you still want it in, but you might not want to put as  
18 fine a point on it as you would in front of a jury.

19          MR. DAVIS: We agree, Judge. I mean, as I told  
20 these guys, every trial I've ever been on started slow and  
21 ended fast.

22          THE COURT: You're right.

23          MR. DAVIS: You know, we're going to be rolling  
24 there at the end, but we're definitely going well into the  
25 second week. It's a lot of folks.

1           THE COURT: Okay. Okay. The questions of law --  
2   you know, there's two entries on a pretrial order, questions  
3   of law and evidentiary issues. They seem to be the same  
4   issues in this case. In other words, you don't have a  
5   straight-up legal defense that as a matter of law the case  
6   must fail. You have certain questions about admissibility of  
7   evidence, but any legal issues that you haven't raised that  
8   you plan on raising?

9           MR. HARRINGTON: The legal issues are laid out,  
10   Judge. John and I have talked about this so it's not  
11   something that I'm kind of keeping close to my vest.

12           I think the government is going to be able to  
13   demonstrate that my client withheld information from the  
14   United Way about his relationship to DigitalNet. I think they  
15   will be able to demonstrate that whether it was my client or  
16   somebody else information was given to DigitalNet -- excuse  
17   me, given to United Way representing certain aspects of  
18   DigitalNet and client lists, things of that nature, which I  
19   think the government will be able to persuasively argue to you  
20   was a misrepresentation.

21           So I think that they will be able to demonstrate --  
22   whether you characterize that as fraud or not will be I think  
23   a different question for you, but certainly  
24   misrepresentation -- lies of omission or misrepresentation, I  
25   think the government is going to be able to demonstrate that

1 to you.

2 The next step I think is whether or not -- relative  
3 to the fraud charges, the way I looked at it is really two  
4 steps.

5 One, do they show these misrepresentations. If  
6 they can show those, the question is going to be was there a  
7 kind of infringement, if you will, on United Way's ability to  
8 control its assets. And if there was an infringement of the  
9 ability to control its assets, was there a tangible economic  
10 harm that resulted to the United Way.

11 So I think that's the rationale that I've looked  
12 at, and so I throw that out there because I think that's your  
13 consideration when you're thinking about the evidence.

14 THE COURT: What count does that go to, all counts?

15 MR. HARRINGTON: I think it does because all the  
16 charges the way that I've looked at them are derivative.

17 MS. LE: FBAR isn't.

18 MR. HARRINGTON: Well, I agree with that, yeah, and  
19 probably the aggravated identity theft. But the wire fraud,  
20 money laundering, all of that is derivative of the fraud and I  
21 think that the government --

22 THE COURT: Derivative of the scheme to defraud?

23 MR. HARRINGTON: Yeah. That's the way I've looked  
24 at it anyway.

25 THE COURT: So if I'm understanding your argument,

1 that if I don't find it -- even if I find all these statements  
2 were false, et cetera, et cetera, your point is if I don't --  
3 if the evidence doesn't establish, whether it's on a  
4 sufficiency basis or just under a legal theory, that that's  
5 part of a scheme to defraud, your point is not guilty?

6 MR. HARRINGTON: And the government would need to  
7 demonstrate a tangible economic harm to United Way. And if  
8 you feel that the government hasn't established that, then no  
9 crime.

10 THE COURT: Okay. How do you plan to sort of  
11 present that to me?

12 MR. HARRINGTON: So part of it is going to be  
13 through questioning of the government witnesses.

14 THE COURT: Of course.

15 MR. HARRINGTON: I also have two experts, a CPA and  
16 an IT expert.

17 THE COURT: No, that's not what I meant. I don't  
18 mean how do you plan to establish it. I mean, how do you plan  
19 to present it. Like, is that a Rule 29 motion? Is that just  
20 a trial brief that you want me to have this idea in mind as I  
21 engage it? Because it's not like it's -- it's a little more  
22 ethereal than just they failed to prove that element. Do you  
23 know what I'm saying? Like, oh, there's nine counts of --  
24 nine statements and on the third one they forgot to, you know,  
25 or they didn't present it. How do you plan to present it? Is



1 it just going to be an argument you're making sort of in your  
2 closing or do you want to try to crystalize it with some kind  
3 of motion or brief or something?

4 MR. HARRINGTON: The way that I had planned on  
5 doing it was going to be at the close of the government's case  
6 and then at the close of my presentation to you.

7 THE COURT: Okay. I get it. Well, that's helpful.  
8 Anything you want to say about that?

9 MR. DAVIS: I think Mr. Hunter is our expert on  
10 loss, but we may not agree that we have to prove actual --

11 THE COURT: Economic loss.

12 MR. DAVIS: -- economic harm provided that it was  
13 the intent in the scheme to defraud to cause such harm and  
14 that there was a risk of harm created.

15 MR. HUNTER: I think that's correct.

16 THE COURT: Harm is not the element or economic  
17 loss isn't the element. It's the statements made as part of  
18 the scheme to defraud.

19 MR. HUNTER: Right. Was there an intent to  
20 defraud. And our position is the government doesn't have to  
21 prove actual loss to the victim as an element. We think we  
22 will prove it, but we don't think that's a required element.

23 THE COURT: All right.

24 MR. HARRINGTON: And that may be one of the areas,  
25 Judge, that I know that I'm going to have some of my

1 associates do some more research. There's some stuff out of  
2 the circuits. I'm sure the government is aware of it. So  
3 there may be a little bit of a split in the decision about  
4 whether tangible economic harm has to be proven or not.

5 So that may be an issue of law that you or your  
6 clerks want to --

7 THE COURT: I'm sure there is law on that. Most of  
8 what I've been exposed to has been in that sort of, you know,  
9 before they amended the statute to include honest government  
10 services, and remember when the idea of kickbacks and losses  
11 were required? That's a long time ago now.

12 What I'll probably do then -- I'll probably issue  
13 it after today. After listening to you guys and your points,  
14 we'll probably issue a little order asking you guys to file  
15 some kind of trial brief to just at least tell us what you  
16 think the elements are.

17 MS. LE: The elements of the offense?

18 THE COURT: The elements of the offense and also if  
19 there's any sort of pesky issues around the edges of the  
20 elements like this one, you know, to cover it for us.

21 MR. HARRINGTON: Yeah, because I think, Judge, if  
22 you find the scheme to defraud and the loss that the  
23 government is saying, I think it just falls like dominos, all  
24 the rest of the stuff, the money laundering, the wire fraud.

25 THE COURT: Because the transactions are there.

1 MR. HARRINGTON: Yeah. So I think the derivative  
2 nature of it, if you find there's fraud, you find there's  
3 economic loss, I think the rest of the stuff falls.

4 THE COURT: I get it.

5 MR. DAVIS: Judge, we are certainly planning on  
6 doing a trial brief, Cam has taken the lead on that, and we'll  
7 definitely file that a week in advance.

8 MS. LE: But given what the Court and counsel has  
9 said, we'll probably add a little section to address the  
10 economic harm aspect of whether that is an element or not.

11 THE COURT: Yeah. Absolutely.

12 The next question is really for Charli.

13 Charli, when do you want them to have their  
14 exhibits premarked and submitted by?

15 THE CLERK: I would think, because it's  
16 Thanksgiving, on the Thursday or Friday. We could say  
17 Wednesday, Thursday, or Friday, but probably Wednesday because  
18 it's a work day. Wednesday, the 27th.

19 THE COURT: Okay. So Wednesday, the 27th. Okay.  
20 So that's the 27th.

21 That's also your witness lists, your actual  
22 will-call, right? So the 27th.

23 Now, let me ask you this. What do you anticipate  
24 in terms of -- we do have a couple of motions in limine on  
25 certain sort of -- they're not so much exhibits as they are

1 types of evidence. On the actual paper do you anticipate many  
2 objections or disputes as to admissibility or do you think  
3 most of it's going to be agreed to and ID stricken? Have you  
4 thought about that at all yet?

5 MR. HARRINGTON: My guess is -- go ahead, Matt.

6 MR. HUNTER: We just started talking about it.  
7 I'll let Tim take it.

8 MR. HARRINGTON: Obviously, I haven't seen the list  
9 so I'll have to take a closer look.

10 THE COURT: Okay.

11 MR. HARRINGTON: But my guess is there's a lot of  
12 stuff that we both agree is coming in. There's probably a  
13 dozen contracts that are out there with DigitalNet, and part  
14 of it's going to depend on what your ruling is relative to  
15 this Robert Allen Group, but definitely with the United Way  
16 we're going to agree all those contracts come in.

17 THE COURT: What about, like, e-mails from  
18 Mohammad? You think they're admissions, right?

19 MS. LE: Yes.

20 THE COURT: You don't agree they're admissions.  
21 So what do we do with Mohammad e-mail?

22 MS. LE: Or a statement of the party's agent.

23 MR. HARRINGTON: Probably, yeah. To be honest,  
24 Judge, I think they're admissible.

25 THE COURT: Okay. All right. So the 27th. You're

1 working on it. I'm just going to urge you to try to strike  
2 the IDs on as much as you can, you know, but I'm not asking  
3 you to give up any rights or sacrifice anything. Just be  
4 reasonable in terms of -- if stuff looks admissible, it means  
5 I'll strike the ID, so we're not spending time in court on  
6 laying foundations and all of that. All right?

7 MR. DAVIS: So just to sort of -- I haven't done  
8 this before here, but, Judge, if we do come to an agreement,  
9 are the parties free to actually on the physical exhibit, on  
10 the label strike the ID and so that's in and it's already in?

11 THE COURT: Yeah. If you give -- when you give  
12 Charli a final exhibit list, whatever you've already agreed to  
13 that's a full exhibit, that ID can be stricken.

14 MR. DAVIS: Right there?

15 THE COURT: You can do it in advance. You can,  
16 like, literally do it as you agree to it. Just submit it as  
17 Exhibit 17 with the ID stricken. But if you haven't agreed,  
18 leave the ID on and we'll do it in the courtroom.

19 MR. DAVIS: And then do we simply say -- at some  
20 point at the beginning of the trial say the parties have  
21 submitted an exhibit list or exhibit lists and have agreed  
22 that ID is stricken on the following and read them all in? Is  
23 that the way to make a record?

24 THE COURT: It can't hurt, but to the extent  
25 anybody during the proceeding says, I'm showing the witness

1 Exhibit 10, if it's Exhibit 10, it's Exhibit 10. If nobody is  
2 talking about striking the ID or anything, it's going to be  
3 Exhibit 10.

4 THE CLERK: I typically read the exhibits into the  
5 record just before we start trial.

6 THE COURT: There you go.

7 THE CLERK: So if there are any changes between the  
8 27th and the 2nd, please let me know and I'll take care of  
9 that.

10 MR. DAVIS: Great.

11 MR. HARRINGTON: What's the court's schedule,  
12 Judge? Are you guys open on Friday or are you guys closed?  
13 So we have Thanksgiving and then Friday.

14 THE COURT: We're open.

15 MR. HARRINGTON: You guys -- you're open. Okay. I  
16 just didn't know if there was a business day before we  
17 started, you know.

18 THE COURT: There's a federal statute that says  
19 we're supposed to be open every single day. Sometimes we do  
20 it with a skeleton crew, but we're never closed. Maybe we do  
21 now, but when I was chief, we never did just because I didn't  
22 think I had the authority to close it. There's always  
23 somebody here.

24 All right. The same for witness lists. The 27th.  
25 Other than the issue regarding the expert's file,

1 is there any evidence that you think you're entitled to that  
2 you haven't received in terms of Brady, Jencks, anything like  
3 that?

4 MR. HARRINGTON: The only other thing that was  
5 mentioned in the motion was relative to a 2 terabyte hard  
6 drive.

7 THE COURT: Yeah, that's expert material. That's a  
8 basis for expert testimony, right?

9 MR. HARRINGTON: That was my argument, that it's  
10 connected to that. I think the government might disagree with  
11 that. But just not to take that off the table.

12 Other than that, I mean, the government has given  
13 me, like, I don't know, like, 49,000 documents.

14 THE COURT: Are the prosecutors aware of any Brady,  
15 Jencks, Giglio material you haven't provided yet?

16 MS. LE: Well, your Honor, yesterday we spoke to  
17 the witness for the first time. I've asked the agent to write  
18 a report. As soon as that is done, we'll send that, but  
19 everything that we have that we needed to hand over we've  
20 produced in discovery.

21 THE COURT: All right. What's the witness's name?

22 MS. LE: Phil Kowalchek. It's a Robert Allen  
23 witness, your Honor.

24 THE COURT: All right. Okay. Yeah, we've got to  
25 talk about that.

1 All right. Okay. I guess it's your motions in  
2 limine.

3 What else do you want to talk about before we move  
4 on to those evidentiary issues? Anything you want to raise in  
5 terms of how we can make things easier for you?

6 MR. DAVIS: I'm not even sure what the agents want  
7 on this, but we would -- if the Court is willing and the  
8 defense is willing, I expect we would want to be able to have  
9 two case agents, Jill Laroe and Todd Donnelly, FBI and HSI, as  
10 our designated people in the courtroom who could then testify.

11 THE COURT: So they're both going to testify?

12 MR. DAVIS: Yes.

13 THE COURT: Okay.

14 MR. DAVIS: I'm not even sure exactly what Todd  
15 will testify about. Jill, at least about the search warrant.

16 So we would ask that. We can talk about it further  
17 if you want to think about it. We would like to have two case  
18 agents present with us who could testify under the rule.

19 THE COURT: What do you say about that?

20 MR. HARRINGTON: It's considered a complex case,  
21 Judge, so I don't think I can really dispute them having a  
22 case agent there under the rule.

23 THE COURT: He's asking for two.

24 MR. HARRINGTON: Yeah, that's the only thing I can  
25 think of is why they need two. I don't know why they would



1 need two versus one.

2 THE COURT: Is that an objection?

3 MR. HARRINGTON: It is, yeah. If there's some  
4 reason, John, I'm happy to think about it and talk about it  
5 right now, but I don't know what the basis is for two versus  
6 one.

7 THE COURT: Yeah. I mean, in the scheme of cases  
8 like this it doesn't seem that it requires more anything, but  
9 I have an open mind about it.

10 MR. DAVIS: Well, I don't -- it's a lot of  
11 exhibits, a lot of witnesses, and I can imagine situations  
12 where we would want one or the other to be out but it would be  
13 nice to have one, but I don't have a special argument.

14 THE COURT: You want one or the other to be out?  
15 What do you mean by that?

16 MR. DAVIS: Say running --

17 THE COURT: Oh. Doing things for you.

18 MR. DAVIS: To talk to a witness or dealing with  
19 something or running back to our office to print something,  
20 you know, all the stuff, but it's --

21 THE COURT: Are you going to have Diane or somebody  
22 with you?

23 MR. DAVIS: Yeah, we'll have a paralegal. I don't  
24 have a special argument, Judge. If the Court is inclined to  
25 -- we can tell the agents we asked. We'll designate one if

1     that's the preference.

2             THE COURT: One for now. But look, if you guys  
3     horse trade between now and trial and you get something you  
4     want and you want to have two, I don't care, but for now it's  
5     just by the book and it's one, okay? Just one for now.

6             MR. DAVIS: I'll also just -- what we usually do is  
7     we'll agree with defense counsel to the night before identify  
8     the witnesses we're calling.

9             MR. HARRINGTON: The next day?

10            THE COURT: That's an order. That's --

11            MR. DAVIS: On condition that defense agrees to the  
12     same. Understanding that the defendant himself has the final  
13     say. But the other defense witnesses we would like to have  
14     notice on the night before. If so, we're willing to make that  
15     agreement.

16            MR. HARRINGTON: Yeah. Absolutely, Judge.

17            THE COURT: Okay. That's an agreement.

18            MR. HARRINGTON: And one of the things that will be  
19     good is, you know, my witness list -- and it may cover some of  
20     the same stuff and so it may be good to talk about the  
21     witnesses because there's no sense in having like a double up  
22     on it. Primarily, it's going to be my experts and so it's  
23     just going to be a coordination.

24            Because one of the things I would like to do is --  
25     I don't want my experts having to sit in the courtroom for a

1 week. So if we can get to the point where we know, you know,  
2 Naviloff is going to testify on a particular day, I can have  
3 my expert there so we can listen to Naviloff, you know, and  
4 then obviously vice versa.

5 THE COURT: Is there going to be -- do you want  
6 regular witness sequestration, everybody sequestered? That's  
7 the rule if anybody wants it.

8 MR. DAVIS: I think so, Judge.

9 MR. HARRINGTON: Yes.

10 THE COURT: Okay. So witnesses will be sequestered  
11 under the rule.

12 MR. DAVIS: Related to that question is, we are not  
13 going to raise a late filing objection to the expert witness  
14 notice requirement for the defense provided we have it before  
15 the trial starts.

16 MR. HARRINGTON: We should have it -- to interrupt  
17 you, I should have that to you no later than Monday,  
18 additional reports from my CPA and the IT guy.

19 MR. DAVIS: All right. So that would be  
20 appreciated. That's all I had on that.

21 THE COURT: Okay. So sequestered witnesses. We've  
22 got one case agent at the table. We've got an agreement that  
23 both parties' counsel will provide adverse counsel the night  
24 before each trial day the names of the witnesses they're going  
25 to call the next day. That's all good.

1                   What else? Anything?

2                   MR. HARRINGTON: I have -- nothing really with  
3 this, Judge.

4                   I have, like, a housekeeping matter about the  
5 repatriation order, but we can take that up after we're done  
6 with the other stuff if you would like.

7                   THE COURT: No. Do it now.

8                   MR. HARRINGTON: Okay.

9                   So my question about the repatriation order -- so  
10 we'll be submitting some information to you. He's not going  
11 to repatriate the funds. So that part is, you know, it's not  
12 happening.

13                  THE COURT: Because he can't.

14                  MR. HARRINGTON: Yeah. Exactly. So we're going  
15 to -- I think it's paragraph 4 of your order, which is he  
16 needs to kind of, you know, come forth with an accounting.

17                  So I just need to know kind of a general framework.  
18 I can tell you what I'm anticipating. I just want to get a  
19 little guidance about what to give you and also how to give it  
20 to you, whether you want that filed conventionally with the  
21 court or whether you want that filed electronically.

22                  So what I intend to try to get for the government  
23 and for the Court is, there are a couple of letters that my  
24 client received from the bank indicating that he doesn't have  
25 access to the bank accounts anymore because of the failure to

1 do that biometric scan, so just to demonstrate to the Court  
2 that he doesn't have access or control over the funds.

3 The bank records. We're trying to assemble some  
4 bank records. And this time they would be unredacted bank  
5 records and they should cover I think the period. Because I  
6 think you guys have the bank records but they were just  
7 heavily redacted by Peter, and I think they cover that time  
8 frame. So there would be unredacted records for them to  
9 review.

10 THE COURT: Those initial disbursements you're  
11 saying or no?

12 MR. HARRINGTON: Correct. It would be the bank  
13 records of the account in Pakistan, because they were obtained  
14 at some point by Peter or my client, you know, when Peter  
15 represented him. So I think it goes up to roughly December of  
16 2018. Does that sound about right?

17 MR. HUNTER: That sounds right.

18 MR. HARRINGTON: So we have those. And that will  
19 show, like, I think there's, like, some account balance of  
20 \$5,000 or something. I forget off the top of my head.

21 I'm trying -- I've told my client that I don't  
22 believe that -- I don't want him to create, like, his own  
23 spreadsheet. I can, if the Court feels it's appropriate, but  
24 it's going to be something that, you know, why would the  
25 government take him at his word. I could have it notarized

1 and have him swear about the disbursements. Kind of like an  
2 accounting.

3 So this is the piece that I'm struggling with is an  
4 actual kind of -- the money is over in the bank, and I think  
5 your order can be fairly characterized to say if the money is  
6 going out of the bank, you've got to kind of tell us where it  
7 went. I'm working on that piece now, and I'm just not sure  
8 what I'm going to be able to put together to do that. I could  
9 have him do kind of an accounting, but I'm trying to do  
10 something that would be more one step removed from him.

11 THE COURT: Yeah, why don't you do it? You don't  
12 feel comfortable?

13 MR. HARRINGTON: So this is all stuff that occurred  
14 in Pakistan. They're not local banks. It's like a separate  
15 company. It's DigitalNet in Pakistan, so it's a separate  
16 company. So I'm trying to see if I can get some records,  
17 things of that nature, that might do it. I have some payroll  
18 records for the staff that was employed there. So that is  
19 probably going to be part of it. It shows, like, automatic  
20 payroll deposits, that type of thing.

21 I'm just letting the Court know what I'm trying to  
22 get together and do.

23 THE COURT: It seems to me -- I mean, I don't know,  
24 because an accounting is not necessarily the raw data or  
25 records that form the base of the accounting. It's an

1 accounting. It's a layout that lists transactions,  
2 disbursements, and all that, balances.

3 It seems to me that -- I don't think they have to  
4 be sworn to by your client. At least that's not what I  
5 envision. It's just got to be something that -- the point of  
6 this is to facilitate the eventual repatriation or forfeiture.  
7 It's not to be evidence against your client.

8 So my suggestion is compile a summary that  
9 summarizes the records. You can provide the records, too, if  
10 you want to show some substantiation, or have one of your  
11 experts do it or some accountant employed by -- but that's how  
12 I view it, a summary of an accounting. An accounting is, you  
13 know, generally a list of balances and transactions and the  
14 like that explain the path of disbursements of these funds.

15 MS. LE: The only thing I'm worried about because  
16 the records are so heavily redacted, say he had a large  
17 deposit of over \$100,000. The very next day he splits it into  
18 three different bank accounts. We would like to know who owns  
19 those bank accounts. That's it.

20 MR. HARRINGTON: Yeah, I think you would see, and  
21 if my client had to put something, like, under oath to satisfy  
22 the government given that, you know, his Fifth Amendment is  
23 protected, he would indicate that there are no other accounts  
24 that funds were, you know, used for.

25 THE COURT: Disbursed to.

1 MR. HARRINGTON: It was this bank, and this bank  
2 was used by DigitalNet Pakistan to pay staff, overhead,  
3 everything related to the things that took place in Pakistan.

4 I know the government has this information through  
5 various witnesses, but there were anywhere from, you know, 15  
6 to 30 people working.

7 THE COURT: Was your client also a member of the  
8 staff over there as well receiving funds?

9 MR. HARRINGTON: No.

10 THE COURT: No?

11 MR. HARRINGTON: No. The money that would be kind  
12 of I think accounted for here would be through, like, the tax  
13 returns that he filed through DigitalNet and AISA Consulting,  
14 which I think the government also has. His money came through  
15 that, not through Pakistan.

16 THE COURT: So I would just describe it as some  
17 type of summary.

18 MR. HARRINGTON: Well, that helps, Judge.

19 THE COURT: I think that complies with the order.  
20 Does anybody disagree with that? No?

21 MS. LE: I think a combination of the summary plus  
22 the unredacted statements should cover it, your Honor.

23 THE COURT: Okay.

24 MR. HARRINGTON: I'll get working on it, Judge. I  
25 know it's the 22nd it's due by. No, I think the -- yeah, the



1 22nd, next Friday. That's my goal. If I need an extension,  
2 I'll talk to the government and file something, but my goal  
3 was to have it on or before that date.

4 THE COURT: All right. Let me ask the prosecution  
5 on this.

6 There's a paragraph in that order that prohibits  
7 the use of any of these disclosures as evidence in the trial.

8 MS. LE: That's right.

9 THE COURT: Do you anticipate any kind of sticky  
10 issues around that where you're going to have to make a  
11 showing that what you're presenting doesn't come from this  
12 accounting?

13 MS. LE: The repatriation? We don't plan to use  
14 that as an exhibit at all. We've already shown the movement  
15 of monies from the U.S. to Pakistan, and that's all we need to  
16 do.

17 THE COURT: That much I get. I'm talking about  
18 more like evidence derived from it, but you have the evidence  
19 already you're going to present.

20 MS. LE: Right.

21 THE COURT: All right.

22 MS. LE: There won't be new evidence that comes  
23 from this, your Honor.

24 THE COURT: All right.

25 MR. HARRINGTON: And then last question, Judge.

1                   How would you want me to submit that? Would it be  
2                   electronic or would you want me to hard copy that to the  
3                   Court, that accounting?

4                   THE COURT: The order says produce it to the Court  
5                   and not to the marshal? It says to the Court? I don't even  
6                   remember.

7                   MR. HARRINGTON: I think if it was repatriated,  
8                   it's to the marshal, and then I think it's to the Court if  
9                   it's an accounting, if I recall correctly. I have the order  
10                  here.

11                  THE COURT: Okay. I mean, I think you could  
12                  provide it to adverse counsel, to be honest. If you're not  
13                  comfortable doing that, file it with the Court under seal at  
14                  level 1 so they have access to it. Why don't you do that.  
15                  File it with the Court under seal at level 1.

16                  MR. HARRINGTON: Okay.

17                  THE COURT: File the -- I guess what I would  
18                  suggest is file the -- file it conventionally under seal with  
19                  copies to them. All right?

20                  MR. HARRINGTON: Okay. So say that one more time.  
21                  So file conventionally under seal?

22                  THE COURT: Conventionally under seal.

23                  MR. HARRINGTON: Under seal. Okay.

24                  MR. DAVIS: A hard copy, not an electronic copy.

25                  MR. HARRINGTON: All right.

1 MR. HUNTER: The convention has probably changed.

2 MR. HARRINGTON: Of course.

3 THE COURT: Anymore housekeeping?

4 THE LAW CLERK: Judge, is there any chance you're  
5 going to have to pick a jury that first week?

6 THE CLERK: I was going to mention that, Judge.

7 We're slated for that civil trial Moody.

8 THE COURT: Oh, Moody.

9 THE CLERK: Yes. That would be Tuesday, the 3rd.

10 THE COURT: Yeah, and I would normally ask someone  
11 else to do it for me, but since it's a pro se I'm not going to  
12 ask someone else to do it for me because that could be a total  
13 nightmare.

14 So there's a chance Tuesday morning we'll have to  
15 start at about noon or 11:00 because I may have to pick a  
16 civil jury. I won't know yet until we have a final pretrial  
17 on that case.

18 THE CLERK: That's next Wednesday, the pretrial.

19 MR. HARRINGTON: So end of the day on Wednesday we  
20 should have an idea?

21 THE CLERK: Yes, you will know.

22 THE COURT: Thanks for that reminder. I hadn't  
23 thought about that.

24 Okay. Let's talk about your motions.

25 There's two motions in limine. I'm trying to

1 remember the docket number. There's a motion in limine to  
2 exclude evidence regarding -- is it Robert A. -- is it Gordon?

3 MS. LE: No. Robert Allen.

4 THE COURT: Allen.

5 MR. DAVIS: Robert Allen Group, RAG.

6 THE COURT: RAG.

7 MR. DAVIS: Robert Allen Group.

8 THE COURT: Thanks.

9 So I have read your submissions. It took me a  
10 while to wrap my mind around it after reading the cases  
11 because -- and, you know, when I first read the motion, I  
12 thought, well, you know, if none of the wire fraud counts and  
13 none of the substantive counts go to Robert Allen Group, this  
14 sounds to me like it's not -- it sounds to me like it's prior  
15 acts or other acts.

16 The objection points out the fact that there's an  
17 allegation of a scheme to defraud Robert Allen Group, and  
18 there is, but none of the substantive acts involve statements  
19 to Robert Allen Group or specific, you know, I guess you call  
20 it economic losses or specific acts to defraud Robert Allen  
21 Group.

22 The cases cited by the prosecution, they're not the  
23 same as this. I don't know if there is a case out there  
24 that's the same as this. Isn't it true -- tell me if I'm  
25 wrong about this. Isn't it true that -- how many counts are

1       there, 52 or something?

2               MR. DAVIS:  Yes, 52.

3               MS. LE:  53.

4               THE COURT:  53.  Thanks.

5               Now, I have read and understand that there is an  
6       allegation that this is a scheme to defraud two victims, but  
7       isn't it true that the jury could return a guilty verdict on  
8       all 53 counts without ever finding a single wire implicating  
9       statement to Robert Allen Group or dollar obtained from Robert  
10      Allen Group?

11              I think a jury could do that.  I think actually  
12      your objection even says that.

13              MR. DAVIS:  I think the jury could, your Honor, but  
14      I think the trial convictions would be subject to a variance  
15      argument that might require an acquittal.  And what I mean by  
16      that is -- because what the cases say is when the government  
17      alleges a single scheme with multiple victims, it owns that,  
18      right?

19              THE COURT:  Yeah.

20              MR. DAVIS:  And we are doing that.  We acknowledge  
21      that by charging a single scheme we have to prove that.  We  
22      have to prove it beyond a reasonable doubt to you that there  
23      is a course of conduct that is sufficiently related that is --

24              THE COURT:  You're saying if a jury found.

25              MR. DAVIS:  If a jury found or a judge found.

1           THE COURT: But you just said they could still --  
2   okay, they could find -- how would that ever transpire?  
3   Because if what you just said is true -- I think I understand  
4   your point. If they could find evidence to prove guilt on all  
5   53 counts without ever finding -- are you saying that they're  
6   going to have to be told on every single count that it was  
7   part of a scheme to defraud Robert Allen Group, even every  
8   disbursement, every one of those wire frauds? I don't think  
9   you're taking on that burden. At least --

10           MR. DAVIS: They would have -- it's like a multiple  
11   conspiracy case.

12           THE COURT: Yeah.

13           MR. DAVIS: If the defense requests it and the  
14   evidence allows it, the jury would be instructed that the --

15           THE COURT: That Count 7 was part of a scheme to  
16   defraud both victims.

17           MR. DAVIS: Right. That the scheme to defraud --

18           THE COURT: And if they didn't find it was part of  
19   a scheme to defraud Robert Allen Group, they could acquit on  
20   that count?

21           MR. DAVIS: I'm trying to get my head around that.  
22   I know that the jury would have to be instructed, if the  
23   evidence supports it, that you can't find that there were two  
24   separate schemes.

25           Now, instead of -- to play it out, I think -- I

1 think the answer might be that if the substantive count -- and  
2 I don't necessarily concede that every substantive count only  
3 involves United Way, including the money laundering.

4 THE COURT: Well, your objection does say that.

5 MR. DAVIS: Well --

6 THE COURT: Your objection does say that.

7 MR. DAVIS: We could talk about that, certainly  
8 most of it, but when the money goes into the bank account,  
9 it's commingled.

10 THE COURT: Yeah, yeah.

11 MR. DAVIS: And there are funds in that Pentucket  
12 account that are wired or that are accessed in other ways than  
13 charged in the indictment, and I don't think we've even  
14 thought about that or felt we needed to.

15 But I guess what I was going to say is I think the  
16 Court -- if the Court instructs you have to find a single  
17 scheme and then finds the government didn't prove a single  
18 scheme but proved two schemes, then the question would be --

19 THE COURT: Or just didn't prove it was part of  
20 a -- it doesn't have to go that far.

21 MR. DAVIS: Or any scheme.

22 THE COURT: Or just it was a part of a scheme to  
23 defraud United Way, that Count 7. That each element was  
24 proven, it was part of a scheme to defraud United Way, but it  
25 was not part of -- a single scheme, though, is to defraud both

1 victims. You're saying that could be an acquittal.

2 If that's his position, you might want this  
3 evidence in.

4 MR. HARRINGTON: Well, you're exactly right, Judge.

5 THE COURT: I can't believe that's your position,  
6 but if it is --

7 MR. HARRINGTON: If that's the government's  
8 position, then let's move on to the next motion.

9 THE COURT: Yeah. If that's the argument, this  
10 isn't much to argue about. I'm a little bit shocked you want  
11 to take on that burden, but it's --

12 MR. DAVIS: Well, I don't think it's an acquittal.  
13 I do think there is a variance argument.

14 THE COURT: Like a sentencing variance?

15 MR. DAVIS: No. That the proof at trial varied and  
16 it was a prejudicial variance and it was error at trial, and  
17 that may be -- so I think you're right. There's no right to  
18 an acquittal on the elements of that offense if Count 7 --

19 THE COURT: Right. So that means you could get 53  
20 guilty verdicts without ever having proven a false statement  
21 to Robert Allen Group or money derived or money defrauded from  
22 Robert Allen Group, money laundering involving the funds of  
23 Robert Allen Group. There's literally -- you could -- this is  
24 in the indictment as one single scheme, I concede, but you  
25 haven't just said, like, give me one verdict on a scheme to



1 defraud against two victims. You've asked for a substantive  
2 verdict on transactions none of which involve Robert Allen  
3 Group, unless you're going to show me I guess some way that  
4 they do, but that's not what your papers say. Your papers  
5 say, no, they don't. They only involve the United Way.  
6 They're part of a larger scheme, but none of the substantive  
7 counts.

8 I think a jury in this case could return a guilty  
9 verdict on every single count without making a single finding  
10 regarding a statement to Robert Allen Group or a wire  
11 implicating statement to Robert Allen Group or a defrauding of  
12 Robert Allen Group, and to me that makes -- even though  
13 there's allegations in the indictment, that makes the evidence  
14 about Robert Allen Group other acts evidence.

15 Now, I'm not saying it's not admissible, by the  
16 way, because it might very well be admissible under 404(b),  
17 but you kind of disavowed that. You said this isn't 404(b),  
18 and then you dropped a footnote that said, well, maybe it kind  
19 of is.

20 You're not arguing in your papers that it's 404(b).  
21 You argue in your papers that it's like res gestae. It's part  
22 of the scheme to defraud two victims.

23 MR. DAVIS: It's intrinsic, correct.

24 THE COURT: It's intrinsic in a way, though, that  
25 kind of allows you to shovel in this evidence without any

1     burden of proving any bit of it beyond a reasonable doubt.

2             MR. DAVIS: Judge, you say none of the cases cited  
3     address that. Well, I strongly disagree.

4             The Andrews case from the Sixth Circuit is exactly  
5     this situation because it's a case involving 17 fraudulent  
6     loans but only the last loan is within the statutory period.

7             THE COURT: Sure.

8             MR. DAVIS: All right? And so you have a broad  
9     scheme that goes back years, but you have one mailing or one  
10    wiring within five years. That's exactly what that indictment  
11    proved. I mean, it charged one count involving one victim and  
12    one transaction, and that's the issue there, but the point --  
13    so one of the practical realities about the indictment is that  
14    much of the Robert Allen conduct, the actual wirings were  
15    beyond the statute of limitations, and so -- I mean, if the  
16    issue is, well, why didn't the government charge him, well,  
17    they were barred by the statute of limitations.

18            Now, there is -- as we also say in the papers,  
19    there is some further conduct, including e-mails, that occur  
20    in April of 2014 within the statutory period.

21            THE COURT: Involving Robert Allen Group.

22            MR. DAVIS: Right. And so -- but the general point  
23    that the government is absolutely -- if there's a single  
24    scheme and the scheme goes back before the statutory period --

25            THE COURT: Then tell me how any one of your

1 counts -- because you can talk about the scheme all you want.  
2 The jury isn't -- but you just said -- you just said if you  
3 don't prove that it's part of the scheme for Robert Allen  
4 Group, he doesn't get an acquittal. I thought you were going  
5 to say that, and you did say that at first, but now you're  
6 saying, well, not necessarily an acquittal, a variance.

7 If you think I want to buy that kind of  
8 complication, that's not going to happen. I'm just not going  
9 to allow you to do the evidence.

10 MR. DAVIS: And we're not either. We're going to  
11 prove that Robert -- I mean, this is intertwined and  
12 contemporaneous. I mean, I don't think it's a close  
13 question --

14 THE COURT: Yeah, I hear what you're saying.

15 MR. DAVIS: -- that this is a single scheme. This  
16 is happening at the same time at two different companies using  
17 the same bank account, using the same kind of contracts, using  
18 the same reputation, the same --

19 THE COURT: That's like saying shooting two people  
20 with the same gun is the same murder. It's not.

21 MR. DAVIS: But it's not, your Honor, because a  
22 scheme is a continuing offense. All of the cases talk about a  
23 scheme can be complex. The Prieto case is right on point  
24 about that, it can involve multiple victims, and so --

25 THE COURT: And it can, but you chose to charge

1 this the way you did. You could have chose -- you could have  
2 I think charged some way -- I think you could have charged  
3 some statement or act vis-a-vis Robert Allen Group as a  
4 substantive count.

5 MR. DAVIS: And the example we get -- I mean, to  
6 me --

7 THE COURT: Which example, the Andrews?

8 MR. DAVIS: The example of the April 2014 threat to  
9 cut off the telephone service if they're not -- because of  
10 nonpayment, which is exactly what he did four years later with  
11 United Way. He writes a letter with that same kind of threat.  
12 This guy gets every crumb he can get even after he's been  
13 discovered.

14 So we could have charged that, yes, but why should  
15 that matter? And as a legal matter, it doesn't matter.

16 THE COURT: It matters because the jury is going to  
17 hear a lot of evidence in this case about Robert Allen Group  
18 now, yet it doesn't need any of that evidence. It doesn't  
19 need any of that evidence to return a single one of these 53  
20 verdicts, and it's prejudicial. It's prejudicial.

21 Now you're saying it's not prejudicial because it's  
22 part of the same scheme.

23 MR. DAVIS: It's also not prejudicial because it's  
24 a bench trial.

25 THE COURT: Now, that's a good point, yeah.

1 MR. DAVIS: Right. And the Court can keep the  
2 various things --

3 THE COURT: That's a very good point. I want to  
4 have that conversation, yeah.

5 MR. DAVIS: But I do think -- I mean, you asked me  
6 the question -- I'm sorry I'm floundering, but I think you're  
7 right, the jury could convict. But if we don't prove a single  
8 scheme, if we prove two schemes or we prove one is a scheme  
9 and one isn't a scheme, there is a strong prejudicial variance  
10 argument post-trial that may require acquittal or a judgment  
11 of acquittal.

12 I've made those arguments. I've had a defendant  
13 who went to trial on a big conspiracy where she had a little  
14 part, and there was a good argument that this is a multiple  
15 conspiracy case.

16 THE COURT: So are you conceding then -- are you  
17 conceding then that if you don't prove a single scheme or you  
18 prove two schemes, that's an acquittal?

19 MR. DAVIS: I'm not conceding it's an acquittal,  
20 no.

21 THE COURT: Okay.

22 MR. DAVIS: I'm conceding we have failed to prove  
23 the single scheme alleged and there may be a remedy which may  
24 include a judgment of acquittal. I don't know. I mean, I  
25 don't know the -- now, to me it strikes me as different with a

1 judge than a jury, frankly. I mean, the argument for --  
2 because the defendant's argument would be I just got acquitted  
3 in a trial where the jury heard Robert Allen Group stuff in a  
4 case where the government charged it as a single scheme. I am  
5 now arguing, and the Court agrees with me, the government  
6 didn't prove a single scheme. It proved two different schemes  
7 that are separated, all right, and so that -- and the jury was  
8 prejudiced on the United Way stuff because they heard the  
9 additional stuff about Robert Allen Group and it shouldn't  
10 have been in there. It wasn't a single scheme. It was  
11 improperly charged. And then you have prejudicial variance.  
12 At least the argument for it.

13 THE COURT: What does prejudicial variance mean?

14 MR. DAVIS: Prejudicial variance means a variance  
15 from the indictment.

16 THE COURT: Okay.

17 MR. DAVIS: It's a basis for a rule -- it could be  
18 a Rule 33 motion. It could be a basis for a Rule 29(c)  
19 motion. I'm entitled to a judgment of acquittal because  
20 the --

21 THE COURT: The evidence varied from the  
22 indictment.

23 MR. DAVIS: The grand jury said something.

24 THE COURT: Yeah.

25 MR. DAVIS: And the proof at trial varied from what

1 the indicted facts are, the government didn't prove it, and  
2 that's why you have a multiple conspiracy instruction.

3 THE COURT: Sure. We don't have any of that here.

4 MR. DAVIS: But we have a multiple scheme at least  
5 argument.

6 THE COURT: Argument. But your indictment says  
7 it's one scheme.

8 MR. DAVIS: Yes.

9 THE COURT: It's one scheme to defraud two people.

10 MR. DAVIS: Correct.

11 THE COURT: Two victims.

12 MR. DAVIS: Two victim companies.

13 THE COURT: But when you ask the jury to return a  
14 verdict, they don't have to make a single -- they either have  
15 to make a finding -- I guess by this argument you're not  
16 conceding that it's an acquittal, so I'm not sure what to do  
17 with this, but you're not -- my view is -- based on what  
18 you're saying, that these substantive counts have to be shown,  
19 even if all the elements are proven, one of those elements has  
20 to be that it's part of a single scheme to defraud not only  
21 United Way but Robert A. Gordon's (sic) business. That way  
22 down the road, like the last wire transfer, right, that's part  
23 of a scheme to defraud Robert A. Gordon.

24 MR. DAVIS: Robert Allen Group.

25 THE COURT: Robert Allen Group. Sorry. Robert

1 Allen Group. I keep doing that.

2 I can't imagine how you're going to do that. I  
3 mean, I can imagine how you could argue it, that it's one  
4 continuing scheme for the same reasons you said, the same  
5 apparatus, the same devices, the same method, yeah, but that  
6 just seems to put us after the fact, like trying to hair split  
7 and decipher this evidence in a way that just seems totally  
8 unnecessary.

9 I don't want to get into why do you need it or why  
10 did you charge it this way, I really don't, because I don't  
11 think that's the Court's role. I wonder those things, but I  
12 just don't think you should have to explain that, to be  
13 honest. You charged it how you did.

14 Don't you see how they have the potential for  
15 allowing you to shovel in tons and tons of prejudicial  
16 evidence that has nothing to do with the substantive counts  
17 the jury doesn't need but could be prejudiced by? Because it  
18 looks very bad. It does look very bad. It's a very similar  
19 scheme. Assuming it's true, it's a very similar scheme. Is  
20 it one scheme or two schemes? Is it two very similar schemes  
21 directed at two different victims that work the same way? I  
22 don't know. That seems like an issue I don't want to buy  
23 after the fact under Rule 33 or 22(c) -- or 29(c).

24 MR. DAVIS: 29(c).

25 THE COURT: That said, it doesn't seem like it's



1 inadmissible evidence to me. It just seems like it's  
2 inadmissible evidence under the theory that you advanced.

3 And the cases aren't the same. I understand your  
4 point about how a series of transactions, only one of which is  
5 within the statute of limitations, can be part of this longer  
6 scheme making all those transactions admissible and relevant.  
7 I totally understand that.

8 But that's not prejudicial in the same way as a  
9 different victim and with different money and different  
10 statements is prejudicial where none of that evidence is  
11 necessary for the finding of guilt on any of these substantive  
12 counts. I don't even know -- I haven't -- it's over on my  
13 desk, the complaint, but -- the indictment, but I think it's  
14 one of those indictments where you've got a different  
15 paragraph number for each count and it's kind of, like, on a  
16 chart or something, right?

17 MS. LE: Yes.

18 THE COURT: Do you anticipate standing up to the  
19 jury and explaining to the jury on each of those how this is  
20 part of the scheme to defraud Robert Allen Group?

21 MR. DAVIS: So if I could just address that just a  
22 little further, Judge, and address the nature of wire fraud.

23 Wire fraud has several elements. One element, the  
24 last element, is a particular execution of the scheme at a  
25 date and time. Now, necessarily every one of those wirings is

1 limited.

2 THE COURT: To satisfy that element.

3 MR. DAVIS: Right. It's an event that happened.

4 And in a complex scheme where there are multiple  
5 victims, as in this case, that particular wiring is always  
6 limited to the context and the circumstance, but that's only  
7 one element.

8 The other element that the jury is instructed on  
9 and the Court has to find is that there was a scheme to  
10 defraud substantially as described in the indictment.

11 THE COURT: Yeah.

12 MR. DAVIS: And so I don't agree with the --  
13 respectfully, I don't agree with the Court when the Court  
14 says, well, the factfinder here could -- you know, is being  
15 asked to do something that has "nothing to do with Robert  
16 Allen." I don't agree with that at all.

17 THE COURT: You don't agree with that at all, but  
18 you did agree when I asked you the very first question I asked  
19 you here, okay? Because I know you don't agree that it's a  
20 different scheme or nothing to do with it at all, but you did  
21 agree that the jury could return guilty verdicts without any  
22 evidence of a statement to the Robert Allen Group or money  
23 defrauded from the Robert Allen Group, and I think that's  
24 true.

25 MR. DAVIS: Well, I don't want to be -- it depends,

1 your Honor, on what is the instruction on what a scheme to  
2 defraud is and to what extent is that instruction bound to the  
3 indictment.

4 I think the Court -- I would love to see what the  
5 First Circuit --

6 THE COURT: So let's get back to it then.

7 Are you going to agree to an instruction that they  
8 have to find that each one of these substantive counts is part  
9 of a scheme to defraud Robert Allen Group?

10 MR. DAVIS: Is part of a single scheme to  
11 defraud --

12 THE COURT: Two victims.

13 MR. DAVIS: -- that includes Robert Allen Group.

14 THE COURT: Yeah. If you're agreeing to that  
15 instruction, we don't have a problem. Because that was one of  
16 my questions to you. If you weren't with me on what it  
17 proves, I was going to say, well, do they each have to be  
18 proven to be part of the scheme involving the Robert Allen  
19 Group. If the answer to that is yes, again I don't think he  
20 has an objection to it and it's -- I think it's taking on a  
21 heavier burden than you need to take on. Because although you  
22 could call this one scheme, you could certainly think of it as  
23 two schemes very easily.

24 But if you think of it as one scheme, that's fine.  
25 Just understand the jury is going to be instructed that these

1 substantive counts have to be proven to be part of that scheme  
2 or artifice involving two victims. That's the only way I can  
3 understand the argument.

4 MR. DAVIS: Does anyone have the First Circuit wire  
5 fraud instruction? Because I thought about that but --

6 THE COURT: Yeah, I have it. I have the book. We  
7 should probably look at the more recent one like the one the  
8 judge --

9 MR. DAVIS: The Court is saying if we were to fail  
10 to prove that the scheme --

11 THE COURT: Give me one moment.

12 MS. LE: The first element is the scheme as  
13 described or described in the indictment.

14 THE COURT: In the indictment, right, which is both  
15 victims.

16 MS. LE: Right.

17 MR. DAVIS: Right. I think we're taking that on,  
18 Judge.

19 THE COURT: Okay.

20 MR. DAVIS: And so if -- and then the question is,  
21 if there is a material variance from the scheme described in  
22 the indictment, I guess we don't prove the scheme, right?

23 THE COURT: Here's what I think this does. If this  
24 is what you want, this is what you want. I think it does two  
25 things. I think it gives him a terrific argument at closing

1 and I think it gives him a terrific appeal issue because I'm  
2 going to have to now on sufficiency decide if there was one  
3 scheme here. And if your very last wire transfer -- okay, if  
4 your very last wire transfer is part of a scheme to defraud  
5 Robert Allen Group by finding it's one scheme to defraud two  
6 victims, which is -- I guess if that's the burden you're  
7 undertaking, that's the burden, but I just think that that's  
8 -- I have no idea why you want to do that.

9 MR. DAVIS: Because it's what happened here.

10 THE COURT: It might be what happened here, but  
11 it's not -- it's still not necessary to prove it. You have an  
12 easy way of proving it.

13 If you want to get some of this evidence in,  
14 there's probably other ways. Look, you know your case better  
15 than me. The last thing I should be doing is telling you  
16 that's not what happened here. You know what happened here.

17 MR. DAVIS: Right.

18 THE COURT: If that's your position, that's your  
19 position, but that means that that's how the jury will be  
20 instructed. It sounds like you're telling me you're okay with  
21 that, but maybe you're not. I don't know.

22 MR. DAVIS: Well, I'm thinking about it because the  
23 Court is -- I mean, we would be foolish not to listen to  
24 warnings. There is, of course, no jury. You're the  
25 factfinder.

1 THE COURT: Oh, yeah. Yeah.

2 MR. DAVIS: And there's no jury instruction.

3 THE COURT: Well, let me be honest. This sounds to  
4 me like two very similar schemes that overlapped -- I mean,  
5 with a very similar modus operandi.

6 I'm not ruling out the possibility that it's a  
7 single scheme, I'm really not, but it's not a hundred percent  
8 clear to me.

9 MR. DAVIS: Well, so let me just add this, and I'm  
10 sorry I'm going on.

11 We do not at all say, and I don't think we say in  
12 our papers, that we don't think it would qualify as 404(b).  
13 The only point in my footnote is to say if someone actually  
14 says this is another crime and it is not intrinsic to the  
15 scheme charged, there are --

16 THE COURT: Another act.

17 MR. DAVIS: Another act.

18 THE COURT: It's footnote 3, and you do say -- no,  
19 it's not footnote 3. It is footnote 2 on page 6.

20 MR. DAVIS: Yes.

21 THE COURT: No, that's not it, either.

22 It is footnote 3. It's on page 8. I'm sorry.  
23 Thanks. It's footnote 3 on page 8. "Even if evidence related  
24 to RAG were properly characterized as other acts evidence  
25 under Rule 404(b), the evidence would be readily admissible

1 under the rule to prove noncharacter matters, including  
2 motive, intent, opportunity, plan, knowledge, and identity."

3 Now, so obviously you're reserving the right to  
4 argue 404(b).

5 MR. DAVIS: Right.

6 THE COURT: But forgive me if I misinterpret that  
7 as not your main argument since, you know, it's a footnote and  
8 you've used the entire catchall of the rule. It's not all of  
9 these things. It might be planned, right?

10 MR. DAVIS: I didn't use absence of mistake, Judge.

11 THE COURT: Fair enough.

12 MR. DAVIS: So, Judge --

13 THE COURT: Yeah.

14 MR. DAVIS: It is perhaps -- I mean, if the Court  
15 is saying you think there's significant doubt about whether  
16 this is a single scheme, as long as we get a fair opportunity  
17 to argue -- to present the same evidence under 404(b), we can  
18 live with that and we don't have to take on the greater  
19 burden. The Court doesn't have to take it on.

20 I'm just saying if that's the Court's ruling --  
21 again, I think it's clearly a single scheme and I think there  
22 are many, many fraud cases where the government is limited by  
23 the statute of limitations on which specific instances of  
24 execution of the scheme it can charge, but it doesn't mean  
25 that we can't prove the rest of the scheme. That never means

1       that.  It just means --

2               THE COURT:  I don't disagree with that there.  I  
3       don't disagree with that.

4               But let me ask you a question, though.  Will it be  
5       sufficient -- see, the idea that it's a single scheme  
6       involving two victims -- I've been saying to you, well, okay,  
7       if that means to prove your substantive counts, you have to  
8       prove it's part of a single scheme to defraud both victims,  
9       right?  So if there's no chance of a wire communication  
10      resulting in a defrauding disbursement, right, if there's no  
11      chance that that defrauded Robert Allen Group and that it was  
12      not conveyed to Robert Allen Group, are you saying that can  
13      still be part of a single scheme?

14              MR. DAVIS:  No, no, because Robert Allen Group was  
15      also communicated with via wire.  And it isn't that there's no  
16      chance -- there's going to be ample evidence of wire fraud  
17      related to Robert Allen Group.  It's just most of it occurred  
18      before the statutory -- I mean, there's certainly plenty of  
19      evidence about wires to United Way that occurred before March  
20      of 2014.

21              So in both cases we're going to be showing fraud  
22      and wire fraud communications that occurred before the statute  
23      and that are not charged substantively.  It's part of the  
24      scheme.

25              THE COURT:  I understand.  I understand that.



1 MR. DAVIS: Okay.

2 THE COURT: It's just that -- you've just brought  
3 so much complexity here that is so unnecessary that  
4 complicates this so much.

5 I guess I could conceive of a set of circumstances,  
6 and these facts might be it, where your wire transfer in Count  
7 4 is part of a single scheme to defraud two victims, okay, but  
8 only as conveyed to and defrauds the United Way and not Robert  
9 Allen Group.

10 MR. DAVIS: Right. We could have one wire fraud  
11 count. We don't have to have 18.

12 THE COURT: Absolutely.

13 MR. DAVIS: We could have one count.

14 THE COURT: Absolutely.

15 MR. DAVIS: Now, that wire is going to be directed  
16 to one victim or the other.

17 THE COURT: Yep.

18 MR. DAVIS: Right?

19 THE COURT: Yep.

20 MR. DAVIS: But it can't be that, well, the  
21 government only has one wire fraud count, it is directed at  
22 victim B, that wiring had nothing to do with victim A, and  
23 therefore this whole thing is a mess.

24 Well, it isn't a mess. The government has to prove  
25 the scheme substantially as alleged in the indictment, and

1 that's what we're doing.

2 THE COURT: But just suppose these overlapping  
3 schemes went back ten years, okay? It sounds like you're  
4 saying that you could charge it that way and put in ten years'  
5 worth of evidence based on one final Andrews style wire  
6 transfer --

7 MR. DAVIS: Correct.

8 THE COURT: -- or wire communication. Boy.

9 MR. DAVIS: And I've been on the other end of that  
10 in a tax evasion case that went back 13 years and they said it  
11 was one tax evasion. I filed a big objection on that. I lost  
12 but --

13 THE COURT: But see, fraud involves victims  
14 generally, people whose property -- have been separated from  
15 their property by means of fraudulent or deceptive means.

16 To go back and back and back basically because it  
17 was the same method, boy, that just seems problematic to me.

18 MR. DAVIS: And I understand that, Judge, but it's  
19 not this case because when you picked this up you go, oh,  
20 Robert Allen Group, prior act. That's what the defense  
21 alleges. It's not prior.

22 United Way was the initial victim. The defendant  
23 started -- I mean, his first job is at Robert Allen Group.  
24 His first fraud is against United Way. During the 18-month  
25 period he's working both places and no one knows it, right?

1 But he starts with United Way, he gets them on the  
2 hook, and then six months after the initial, you know,  
3 services contract with United Way he then goes to Robert  
4 Allen.

5 It's not prior. We're not going back ten years.

6 THE COURT: I get that.

7 MR. DAVIS: We're talking about the same --  
8 literally the same period here.

9 THE COURT: You haven't given me authority though  
10 analogous to this, have you? You haven't given me  
11 authority -- I'm not saying it's impossible, but you haven't  
12 given me authority with victims who were defrauded outside the  
13 statute.

14 MR. DAVIS: Andrews. Four victims.

15 THE COURT: Okay.

16 MR. DAVIS: The last wire that occurred only  
17 involved one loan and therefore must have been one victim, you  
18 know, but that scheme went back years and the Court had no  
19 problem with that.

20 THE COURT: What do you want to say about all of  
21 this, if anything I mean?

22 MR. HARRINGTON: Not much, Judge. If the  
23 government is saying what it sounds like it's saying, they  
24 want to admit evidence relative to Robert Allen Group to show  
25 that this was one scheme and that it pertains to all counts,

1 then I accept that, that's their burden, and I would -- I'm  
2 ready to go forward on it.

3 MR. DAVIS: What the government accepts is the  
4 elements of the offense as specified in the First Circuit and  
5 for the wire fraud counts -- not for the theft counts I think,  
6 but for the wire fraud counts the government has to prove the  
7 scheme as alleged in the indictment. Substantially as  
8 alleged. It's not ever going to be exactly as alleged in a  
9 complex indictment, but that's what is charged, a single  
10 scheme.

11 MR. HARRINGTON: And if that pertains to --

12 THE COURT: Both victims.

13 MR. HARRINGTON: As the Court has laid out that,  
14 you know, each wire transaction the government needs to prove  
15 it, then I understand what the rationale is.

16 THE COURT: Me, too.

17 MR. HARRINGTON: So --

18 THE COURT: Here's the argument I think we're going  
19 to be dealing with later though, all right, when you move for  
20 acquittal and I grant or deny, whatever, eventually. What the  
21 government's position is going to be is, well, we didn't have  
22 to prove that the statement was made to Robert Allen Group or  
23 defrauded Robert Allen Group. We just had to prove it's part  
24 of the same scheme.

25 I'm not sure how somebody makes that distinction, a

1 trier of fact. I really don't.

2 MR. DAVIS: Can I?

3 THE COURT: Please. Please tell me.

4 MR. DAVIS: So, Judge, the distinction is among the  
5 different elements of wire fraud because element 1 says --

6 THE COURT: Yeah, it's a difference between element  
7 1 and element 4. I get it.

8 MR. DAVIS: My only point is, and I've said it, but  
9 every wiring is only against one victim.

10 THE COURT: One victim.

11 MR. DAVIS: Every wiring, every mailing in a mail  
12 fraud, it's always a particular instance of the fraud, and so  
13 what --

14 THE COURT: Yeah. You had two contemporaneous  
15 schemes though and it was sort of -- you wanted to call it one  
16 scheme that was being operated at the same time.

17 What you've got here is overlap, right, and it  
18 looks like the relationship and this, I don't want to say  
19 scheme, the relationship and the engagement with, the  
20 interactions with Robert Allen Group at some point stopped and  
21 they continued on with United Way.

22 MR. DAVIS: Correct.

23 THE COURT: And even though you're taking on this  
24 burden that it's one scheme, defense is going to have a pretty  
25 good argument that I can't imagine how a wire communication on

1 Count 9 that defrauded the United Way is really part of a  
2 scheme that includes a single scheme to defraud Robert Allen  
3 Group when he hasn't had contact with them for a year. That's  
4 the argument, right?

5 MR. HARRINGTON: Yeah.

6 MR. DAVIS: But that argument is meritless because,  
7 again, every wiring, every mailing is about a particular point  
8 in time and a particular victim and --

9 THE COURT: But is the scheme involving Robert  
10 Allen Group still ongoing?

11 MR. DAVIS: No, it isn't.

12 THE COURT: No.

13 MR. DAVIS: That phase of the single scheme is  
14 completed.

15 THE COURT: See, this is just semantics and  
16 sophistry then at that point. Well, yeah, it's not part of  
17 the scheme to defraud. It's part of the different phase of a  
18 single scheme. I mean, I just find that -- I find that to be  
19 unnecessarily complex.

20 The bottom line is, though, you've taken on the  
21 burden. I'm going to have to figure out if I'm persuaded by  
22 it come trial time.

23 MR. DAVIS: So can we talk about the Court's  
24 preferred -- I mean, is the Court saying --

25 THE COURT: Well, let's get off the record then if

1 we're just going to talk. I don't want to make her -- I'm  
2 listening.

3 (OFF THE RECORD)

4 THE COURT: We just had a little bit of a  
5 discussion. It wasn't at all inconsistent with what was on  
6 the record. The bottom line, as I understand it, is this.  
7 I'll state it as I understand it. If either counsel  
8 disagrees, they can tell me.

9 This is a single scheme allegation because an  
10 element of mail fraud -- wire fraud, sorry, is a scheme or  
11 artifice to defraud. The government's position is by its  
12 indictment it has undertaken the burden on the wire fraud  
13 counts to show that each of these instances of wire fraud are  
14 part of a single scheme involving both victims, the United Way  
15 and Robert Allen Group.

16 With that representation, the defense no longer  
17 objects because they get to make that argument at trial.

18 Am I right?

19 MR. HARRINGTON: That's right, Judge.

20 THE COURT: Okay. So that motion is withdrawn  
21 based on the position the government has taken in this  
22 hearing.

23 So let's talk about the other one.

24 Let's get off the record again.

25 (OFF THE RECORD)

1 THE COURT: On the motion in limine regarding  
2 expert materials, this is document No. 47, here's how we've  
3 resolved it. There's basically three components at issue.

4 One is a list of names of United Way personnel that  
5 Naviloff interviewed or had access to. There are not  
6 summaries of those contacts, they don't exist, but the list of  
7 those names is going to be provided to defense counsel.  
8 That's number one.

9 Number two. There were two imbedded employees from  
10 DigitalNet at the United Way. Their laptops were imaged, and  
11 those laptop images are going to be provided to defense  
12 counsel and his expert for their review.

13 MS. LE: Can that be under FBI supervision, your  
14 Honor?

15 THE COURT: Sure.

16 MS. LE: That's how we normally do it.

17 THE COURT: That's completely reasonable.

18 MS. LE: Thank you.

19 MR. HARRINGTON: And I just want to make sure that  
20 includes -- my client's computer was also. So it was two  
21 imbedded employees plus my client.

22 MR. HUNTER: Yes.

23 MS. LE: You returned his client's computer?

24 MR. HUNTER: We returned his personal computer, not  
25 his United Way.



1 MS. LE: Okay.

2 MR. HARRINGTON: This was the United Way.

3 THE COURT: The third issue is regarding imaged  
4 laptops of a number of laptops at the United Way during the  
5 relevant time period.

6 Counsel and their experts are going to meet and  
7 confer and by next Thursday, which is the 21st, are going to  
8 file a stipulation with the Court about the parameters of  
9 defense counsel's expert's access to those laptop images in  
10 order to basically prepare the defense expert to make his  
11 report and prepare defense counsel to cross-examine Mr.  
12 Naviloff.

13 I have every confidence you're going to reach an  
14 agreement on that, but of course I'm available to you if you  
15 can't whether it's a disagreement between counsel here or  
16 issues injected by the victim, United Way. All right?

17 MR. HUNTER: Thank you, your Honor.

18 THE COURT: All right.

19 MR. HARRINGTON: And just to make sure we're  
20 talking the same, apples and apples, we're kind of thinking  
21 about the e-discovery platform. All that stuff was uploaded  
22 to that. That's my understanding, right?

23 MR. HUNTER: My understanding from the  
24 conversations, search terms that would be run on the  
25 e-discovery platform that Mr. Naviloff had access to.

1 MR. HARRINGTON: Okay. We're on the same page.

2 THE COURT: All right. Anything else, counsel?

3 MR. HARRINGTON: No.

4 MR. HUNTER: No.

5 THE COURT: All right. This was kind of a long  
6 pretrial, but I appreciate your high level of professionalism  
7 and collegiality. We're adjourned.

8 (Conclusion of hearing)

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## C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 12-21-20      /s/ Susan M. Bateman  
SUSAN M. BATEMAN, RPR, CRR